THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL No 289 of 2010

(From original conviction and sentence in Criminal Case No. 2573 of 2009 of the Nyahururu Principal Magistrate\'s Court - T. Matheka, P.M.)

JOSEPH ESEKON TUMBO…….....…….
…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

JOSEPH ESEKON TUMBO (ESEKON) was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006 *(No. 3 of 2006).* He was on the evidence convicted and sentenced to life imprisonment.

2. Aggrieved with both his conviction and sentence, he appealed to this court initially on 5 grounds which he substituted under Section 350(c)(v) of the Criminal Procedure *(Cap. 75, Laws of Kenya)* with five new grounds. These are -

(1) That the appellant fundamental rights were violated under article 49(1)(a) and 50(1)(2)(a)(b)(c) of the Constitution,

(2) That the learned trial magistrate erred in law and fact when he said the prosecution had proved the case beyond reasonable doubt and yet he failed to note that the case was poorly investigated.

(3) That the learned trial magistrate erred in law and fact when he failed to note that the prosecution evidence was full of contradictions and not corroborating.

(4) That the learned trial magistrate erred in law when he failed to ask the prosecution why some essential witnesses were not summoned to court especially the mother of PW2.

(5) That the learned trial magistrate erred in law and fact when he shifted benefit of doubt to the appellant and at the same time he rejected my application as per my treatment card.

3. For those reasons Esekon prayed that his appeal be allowed, his conviction be quashed, sentence set aside, and be set free.

4. In addition to the new grounds of appeal, the appellant also filed written submissions on each of the grounds. These grounds may be summarized into three propositions namely -

(1) whether Esekon\'s fundamental rights were violated, and what is the consequence of such violation?

(2) whether the prosecution proved its case to the required standard in criminal cases,

(3) whether the learned trial magistrate considered the evidence of the appellant,

5. Before discussing these points, it is opportune at this stage to say that the appeal was opposed by the State *(Respondent).* According to the submissions of Miss Idagwa, learned State Counsel, there was clear evidence that the appellant defiled the complainant. The appellant was a friend of the mother and they used to live together with the complainant. The evidence was concise. PW1 took the child to hospital, PW4 examined the child and produced Police P3 Form showing the results of the examination, the child\'s hymen was broken, penetration was complete, the child victim was 9 years of age. The victim gave a detailed account of the incident, and saw the appellant well. Counsel therefore asked the court to dismiss the appeal.

6. As the first appellate court, it is my statutory duty as well command of precedent to examine and re-evaluate the evidence before the lower court, and make my own findings and come to my own conclusions. Before I come to examine that evidence, the appellant has raised one constitutional point that his fundamental rights to a fair hearing in terms of Article 50(2)(e) - that the trial should begin and conclude without unreasonable delay. The appellant\'s case is that there were no less than five adjournments in the course of his trial, and this violated his fundamental right to a trial without unreasonable delay.

7. This is not the place or time to inquire whether or not the delays were unreasonable. It is not the place and time to make such an inquiry because this is an appeal and not a Petition for breach of fundamental rights. It is now settled law and precedent that a breach of fundamental right of an accused person or like the appellant in this case, does not vitiate his trial. I therefore reject the Appellant\'s contention to the contrary.

8. Having disposed of that ground, I now turn my attention to the other two issues, whether the prosecution proved its case beyond reasonable doubt, and whether the learned trial magistrate considered the appellant\'s evidence, in particular that he was an HIV/AIDS sufferer and was on medication for the said disease.

9. The Appellant was charged with defilement. To prove "defilement" the prosecution needs to show -

(1) that there was penetration,

(2) that the child was aged eleven years or less.

10. The evidence of PW1, the grandmother of J.A *(the victim),* was that upon being informed by her sister (PW3) that the child had been defiled by the appellant, she examined the child and observed discharge and also observed that the child was **"walking with her legs apart".** Upon asking the child what had happened, the child informed her that it was **"Joseph Esekon".** PW1 took the child to Ngomongo Police Station where the child was then taken to Nyahururu District Hospital where the child was examined and Police P3 Form was completed. PW1 knew the appellant and that her son arrested **"Esekon"** and took him to the Police. PW1 also knew the appellant well.

11. PW2 *(the victim)* upon being subjected to a *voire dire* by the learned trial magistrate was found to be intelligent enough to testify. She gave an unknown statement. She is 9 years old, although she does not go to school. She knows the appellant. *"He is a neighbor. She was sleeping on the night of 8th November when the appellant broke the window of the house and found her sleeping in the house. He uncovered her from the blanket. He threatened to kill her if she screamed. He took his thing which is infront of his body and put it inside me here (points at her groin - were the remarks noted by the trial magistrate).*

12. PW2 further stated that the appellant satisfied with himself, slept in the house till the next morning. On the 9th November 2009, PW2 told her mother about the incident, but she did not want to hear about it. The child then informed her aunt R.N *(PW6 - also caleed R.L.K).* The aunt then informed the grandmother (PW1), who in turn reported her mother to the Police, and took her to Hospital.

13. When cross-examined by the appellant the victim reiterated her statement that the appellant had threatened to kill her if she screamed, and the mother came in the morning and found the appellant in the house but she did not tell her *(the mother what the appellant had done to her).*

14. PW3 investigated the case on instructions of the Officer Commanding the Station. He found two (2) Administration Police Officers, the child, the aunt and a boy called Samuel. He escorted the victim to hospital and upon receipt of the results of the examination by the Doctors, that the child had been defiled, he charged the appellant with the offence of defilement as already stated above.

15. PW3 also testified that the appellant had been assaulted by members of the public and had suffered a deep cut on his head. He also took him to hospital for treatment.

16. PW3 reiterated his evidence upon cross-examination by the appellant. He also corroborated the evidence of PW1 that the child was walking with difficulty, and further reiterated what the child (PW2 had said, that the appellant had made forced entry into the house where the child was sleeping).

17. PW4 was Doctor Waiti Kariuki, the Medical Officer at Nyahururu, who produced the P3 Form which was compiled and signed by his colleague Dr. John Kabau who had examined the child (PW2) when she was taken to hospital by PW3. The report showed bruising on the external genitalia, a broken hymen - evidence of penetration.

18. PW5 was an Administration Officer, Amos Obare who received the report of the incident, from members of the public who included an uncle of the child, the grandmother of the child, and the mother of the child. The mother was arrested and taken to Nyahururu Police Station together with the child. He observed that the child **"was walking with difficulty",** both in his evidence in-chief and on cross-examination by the appellant.

19. PW6 testified that she had called the victim at about 6 pm on 9th November 2009, to send her to pick up some small item from the shops. As the child was on her way to the shops, she noticed the child was **"walking in a funny way"**, and so she called her back, and sought to know from why she was walking in that manner.

20. It is then that the child (PW2) informed her that the appellant had the previous night forced his way into their house through the window and had raped her, with threats to kill her if she screamed. PW6 thereafter took the child to J.A (PW1), the grandmother, and reiterated the information given to her by the child (PW2). PW6 reiterated the evidence of PW2 that the appellant was well known to the child as he used to live with the child\'s mother and the child had said it was the appellant who defiled her.

21. PW7 reiterated the same information both in his evidence in-chief, and upon cross examination by the appellant, that the appellant had defiled the child with threats to kill her if she screamed.

22. With the evidence of those (7) witnesses the appellant was put on his defence. The appellant elected to give an unsworn statement.

23. The appellant denied defiling the child. On the material night he had, after taking some brew at 7.00 p.m., gone to his brother\'s place and slept there until the morning of 9th November, 2009. His brother is called Joseph Luptiro. He confirmed that he was being looked for and was arrested by members of the public who took him to the Police Station on 11th November 2009. He confirmed that he knew both the complainant and her mother and the grandmother, as they came from the same area.

24. The Appellant protested his innocence, that if he had defiled the child, she would have been infected with the AID\'S virus (HIV), as he said, he suffers from HIV-AIDS and he goes for treatment, and that for that reason alone he could not have defiled her - the appellant showed the court a Ministry of Health Hospital Card - AIDS/STD Control Programme - 2044/3703310.

25. The Appellant also called one witness DWII - a Mr. Josephat Chemilel who testified that he had found the appellant in his house on the evening of 8th November 2009, and that they ate together and that while he went to sleep in his room with his wife, the appellant slept in another room where there were two (2) women and a child, and that the next morning they woke him as he had told them to wake him up, and that he woke up and went to work.

26. In her judgment, the learned trial magistrate had observed, quite validly, I may add, that the evidence of DWII that the appellant had slept in his house, did not tally with that the appellant\'s unsworn statement that he had slept at Joseph Luptiro\'s place - but had not called him in his evidence, but had instead called DWII who contradicted the appellant\'s statement that he had not slept at his brother\'s place, but at DWII\'s place.

27. That is a valid observation arising out of the contradictory evidence by the appellant and his defence witness. It cannot be remotely said to amount to shifting of the burden of proof on the appellant. It is, on the contrary, the other way of saying that that the Appellant had no evidence to controvert the evidence of the prosecution witness. That too is my finding and I so hold.

28. That evidence essentially demonstrates that the prosecution proved its case beyond reasonable doubt and the findings and conclusions of the learned trial magistrate cannot be faulted at all.

29. There is however one point upon which I wish to make further observation, and that concerns the appellant\'s obsession with the denial that he did not defile the child, and that if he did so, he would have infected the child with the HIV virus. The Appellant\'s sole evidence to support this was a treatment card with the AID/STD Control Programme. It is not clear and there was no evidence that the appellant was under treatment for HIV and not any other STD infection.

30. Whereas it is a matter of grave concern to all and sundry, and more so to the court, that where a person infected with, and under treatment for HIV/AIDS infection has sexual intercourse with a non-infected person there are great chances that the non-infected person might also get infected, it is not correct, and it is not a defence, to suggest that where a person who has been raped or defiled does not show signs of such HIV/AIDS infection, means that person, or that child has not been raped or defiled by the person said to be suffering from HIV/AIDS.

31. Put differently, the fact that the aggressor/assailant is an HIV/AIDS sufferer is no defence for the rape or defilement. In any event for a case of defilement of a child, the prosecution showed that there was penetration of the child, and that the child was 9 years of age. Those are the essential elements. The defence of HIV/AIDS was a red herring. It does not help the appellant.

32. The punishment for defilement of a child of the age of eleven and less is life imprisonment under Section 8(3) of the Sexual Offences Act. The sentence of *(life imprisonment)* meted against the appellant was therefore lawful.

33. For all those reasons, I find no merit in the appellant\'s appeal and the same is dismissed forthwith.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of April, 2012

M. J. ANYARA EMUKULE
JUDGE